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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

SALVATORE BONANNO AND PETER NOTARO, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Salvatore Bonanno and Peter Notaro pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on July 28, 1970.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is not officially reported and is reproduced at Pages 1a through 9a of the Appendix to this petition. The opinion of the United States District Court for the Southern District of New York (Mansfield, J.) has not been reported and is reproduced at Pages 11a through 22a of the Appendix to this petition.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 28, 1970, and is reproduced at Page 10a of the Appendix to this petition. By order dated August 17, 1970, Mr. Justice Harlan extended the petitioners' time in which to file a petition for a writ of certiorari to and including September 26, 1970. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether the failure of the prosecutor to disclose matters helpful and useful to the defense, and within his knowledge, in violation of defendants' right to due process, may be excused as harmless where it was not a deliberate act of suppression and where one of the theories on which the case was submitted to the jury was sustainable without reference to evidence which would have been affected by the required disclosure?

2. May a jury in a mail fraud case be properly instructed that it may return a verdict of guilt even if it concludes that defendants were acting under what they believed to be proper authority to use the credit of another and were acting without a fraudulent animus?

CONSTITUTIONAL AND STATUTORY PROVISIONS

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

TITLE 18, UNITED STATES CODE, SECTION 1341.

Frauds and Swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of,

loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139, § 34, 63 Stat. 94.

Title 18, United States Code, Section 1342.

Fictitious Name or Address

Whoever, for the purpose of conducting, promoting, or carrying on by means of the Post Office Department of the United States, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763.

TITLE 18, UNITED STATES CODE, SECTION 371.

Conspiracy To Commit Offense or To Defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

STATEMENT

The petitioner Bonanno (who was sentenced to four years in prison and fined ten thousand dollars) was convicted of one count of conspiracy to commit mail fraud and fifty-two substantive counts of mail fraud (18 U.S.C. §§ 371, 1341, 1342) and two counts of perjury (18 U.S.C. 1621). Petitioner Notaro was convicted of the conspiracy and mail fraud counts but acquitted of a single count in the indictment which charged him with perjury. He was sentenced to one year's imprisonment and fined one thousand dollars.

The prosecution arose from the use by Bonanno and Notaro of the Diners' Club credit card of one Don A. Torrillo. The essential outline of the facts is set forth in the opinion of the Court of Appeals (Appendix to this Petition, pp. 1a-10a, at 2a and 3a). With the exception of one instance, the actual use of the card was

laid to Bonanno, and indeed there was no dispute that he had used the card; most of the evidence as to the use of the card went in by stipulation. The thrust of the prosecution was that the card had been obtained by one Perrone (since deceased) and the indictment charged that Perrone would "take, steal, extort and abstract" Torrillo's Diners' Club card (Count 1 of the indictment). The thrust of the defense was that the defenders believed themselves to be authorized by Torrillo to use the card, and that Perrone, who was a social and business acquaintance of Torrillo, as was Bonanno, had Torrillo's permission for Bonanno to use the card. Torrillo's credibility was accordingly of critical importance.

On initial cross-examination counsel had sought to press Torrillo about his questioning by the New York police (192).* Torrillo had been arrested and the charges against him dismissed. The prosecutor in a startling statement to the Court characterized them as "trumped-up" charges, saying that the police officers had come to Torrillo's home and arrested him on "three phony charges" (193). But it was the local police who turned their interview over to the postal inspectors. The Court ruled that the questioning was remote and speculative and counsel would be permitted to ask whether he was motivated by any desire to escape prosecution (196-197). Of course, simply asking a witness like Torrillo for his own description of his motivation is hardly the equivalent of examining him. If the matter had rested there the defendants would have suffered a serious deprivation in regard to their cross-examination. However, the Court had directed to be

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* Numbers in parentheses, unless otherwise indicated, refer to the stenographic minutes of the trial in the District Court.

turned over to the defense, notes transcribed from recordings which the local police had made during their interviews with Torrillo, and permitted Torrillo to be recalled for further cross-examination on those matters, and during that cross-examination Torrillo conceded that he had told the police that he really didn't know how the card was stolen (451), and made various other hedging and fencing statements (460-461). He persisted in his view that he was motivated by fear of the defendants and that his testimony was not the result of a desire to extricate himself or curry favor with prosecuting authorities.

Again and again counsel made it clear that Torrillo's motive in testifying was of first importance, e.g., pages 500, 195, and again and again Torrillo persisted in saying that his only fear was of the defendants:

> "A. As I said before, I was not in fear of being prosecuted for anything, Mr. Sadler, because I didn't do anything wrong. My main fear was motivated from the structure which I feared, will fear and always fear." (500)

Whatever success counsel had in other areas, their efforts to show a motive to testify from the fear of prosecution or punishment bore no fruit.

After the jury's verdict some striking information came to light. The jury returned its verdict on Friday, November 14th and all post-verdict motions were reserved until the day of sentence. By appointment, trial counsel and the prosecutor met with Judge Mansfield at the end of the day on November 19th and counsel for Notaro reported that on the previous Monday he'd encountered a lawyer who asked him whether the Torrillo who had testified in the case was the same Tor-

rillo who was under Indictment. Notaro's counsel then checked the records and found that there was a Torrillo indicted in a securities fraud case, and he desired to promptly inform the Court. The prosecutor then told the Court:

> "MR. PHILLIPS: I can verify, your Honor, that this Mr. Torrillo, the same Mr. Torrillo who testified in the trial last week, is under indictment in the Southern District for a security violation, and so I don't think that we need to go any further. It is the same man. I gather that the reason that Mr. Sandler is bringing this up is because he would have liked to have had that information last week in order to cross-examine Mr. Torrillo about it. I would naturally have objected to it since it would not be a felony conviction and therefore not proper to be brought up for impeachment purposes in cross-examination.
>
> It is only an indictment and it has not been brought to trial." (Proceeding of November 19, 1969, page 4).

After this conference with Judge Mansfield, written motions were filed returnable on December 30th. In connection with those motions, the prosecutor filed an affidavit from Torrillo indicating that he had encountered Bonanno's trial counsel outside room 318 of the Southern District Courthouse, which is part of the court where the criminal calendar is handled, and had indicated to Bonanno's trial counsel (who remains counsel on this petition) that he (Torrillo) had a problem arising from a securities case. Bonanno's counsel filed an affidavit in traverse of these allegations, concerning that he had encountered Torrillo, but denying any conversation or knowledge about a pending case against Torrillo. Judge Mansfield denied defendant's

motions for a new trial; his opinion is reprinted at pages 11a *et seq* of the Appendix to this petition.

Judge Mansfield concluded that since the matter of the charge against Torrillo was publicly recorded, the prosecutor had "understandably though erroneously assumed knowledge on part of defense counsel" (p. 18a, Appendix to this petition). Though he found an "uncompromising duty" on the part of the prosecutor to disclose to defense counsel prosecutions pending in the prosecutor's office against a government witness, he nevertheless rejected the defendants' request for a new trial.

The Court of Appeals took an even more stringent view of the prosecutor's failure to make disclosure. On appeal the Government conceded the admissibility of a pending prosecution as bearing on a motive to testify favorably for the Government. (See Opinion of the Court of Appeals at p. 4a of the Appendix to this petition.) Moreover, the Court recognized that this was the sort of evidence that, even if inadmissible, might have played an important role in defense preparation; equally the Court noted that the prosecutor's view of admissibility could not justify a non-disclosure without usurping both the role of defense counsel and the Trial Court, and in so doing the Court cites and quotes the language of *Griffin* v. *United States,* 183 F.2d 990, 992-993 (D.C. Cir. 1950). (Appendix to this petition, p. 4a).

The Court of Appeals further rejected the contention that the prosecutor "understandably" assumed that defense counsel knew that Torrillo was under indictment by the very United States Attorney's office conducting the prosecution of Bonanno and Notaro. The Court

rather found that the prosecution "served its narrow interest of securing a conviction at the peril of the diligent search for truth". (Appendix to this petition, p. 5a).

Further the Court found that the prosecutor's attention should have been "flagged" by persistent defense efforts to impeach Torrillo with regard to his motive to testify for the Government, and in footnote 3 rejected as self-serving the Government's suggestion that the absence of cross-examination of Torrillo about the pending indictment was a defense tactic (Appendix to this petition, p. 5a). The Court of Appeals then proceeded, while rejecting the Government's justifications of the non-disclosure, to conclude that since the non-disclosure was "negligent", the defendants had to show the materiality to the verdict of the non-disclosure. It concluded that the non-disclosed material would not have raised a reasonable doubt in the minds of the jurors. We shall return when we argue the reasons for the granting of this writ to the hiatus in terms of logic and justice which exists between the Court's analysis and its conclusion. For the moment, it seems enough to note that the word "negligent" here does not refer to the prosecutor's failure to discover the material to which defense was entitled. This was no obscure piece of information buried in a remote government file. The word "negligent" rather refers to the mental process by which the prosecutor arrived at the decision not to disclose material which was within his knowledge.

A second and closely related error raised in the court below and intertwined in its consideration was the charge of the Court concerning the mail fraud.

In part, the Court charged the jury:

"There has been evidence introduced as to whether the card was borrowed or extorted from Torrillo, as to whether Bonanno was authorized by Perrone to use it and the defendants thought they had the right to use it, and as to whether Bonanno intended to did not intend ultimately to pay the charges in excess of some $2,400 that were incurred through his use of the card.

This evidence may be considered by you in resolving the ultimate issue of whether there was a scheme or intent to defraud. *However, it is not essential for the government to prove that the card was extorted, or that the defendants were not authorized to use it, or that they did not intend to pay.* In other words, if you find beyond a reasonable doubt that they schemed to misrepresent themselves as Torrillo in order to deceive the Diners Club and establishments into furnishing goods and services that would not have been furnished if they had disclosed their true identities and that they had reason to believe that the establishments and Diners' Club would then use the mails to collect and pay the bills for the merchandise and services, *you may find that there was a scheme to defraud regardless whether the card was borrowed or extorted, regardless of whether Perrone gave the defendants authority to use the card, and regardless whether they intended ultimately to pay for the goods and services.*

If, on the other hand, you find that the defendants believed that their misrepresentations of their identity was immaterial, or that they had the right to use the card, you would find that there was no scheme to defraud.

Thus one of the ultimate issues which you are called to decide is whether there was a scheme to defraud substantially along the lines alleged." (746-766) [Emphasis Supplied]

The instructions quoted are, of course, absolutely inconsistent because in the third paragraph quoted the jury is told in the disjunctive that they would find no scheme to defraud if they found that the defendants believed either: (1) that misrepresentation of their identity was immaterial, or (2) that they had the right to use the card, while earlier in the instructions the jury was told that it was not essential for the government to prove (a) the card was extorted, (b) the defendants were authorized to use it, or (c) they did not intend to pay, and that it was immaterial whether the card was borrowed, or Perrone gave authority to use the card, or whether they intended to pay. Since from the point of view of fraud, an honest intention to pay is the equivalent of payment (See *United States* v. *Kyle*, 257 F. 2d 559, 565 (2nd Cir. 1958), these instructions amounted to telling the jury that even if Torrillo had willingly lent the card to Bonanno through Perrone and authorized him to use it and he had used it and paid for the services, and Notaro knew of these circumstances, he and Notaro would have been guilty of a mail fraud. The net effect of the instructions was to make the defendants guilty if Bonnano had ever used Torrillo's card and signed Torrillo's name. This self-contradictory charge, coming as it did after the prosecutor's inflammatory, extortion-focused summation, could not but have confused the jury. Even without that summation, it hardly provided a basis of guidance for their deliberation. In and of themselves, the instructions complained of were self-contradictory, confusing, and erroneous.

The consequences of the rule contained in the residuum of the instructions are horrific to contemplate. The rule apparently assumes that the use of the name of another, even with authority and without any inten-

tion to default on financial obligations, constitutes a mail fraud, if the other party in the transaction might not enter into it if he knew the true name. Ghost-written books sold through the mails would obviously, under this rule, constitute a mail fraud. A brief, or other legal document bearing the name of illustrious counsel, which is in fact entirely the work of another's undisclosed effort, would if served, distributed, or paid for by mail, constitute a mail fraud.*

Each of the defendant's trial counsel made a specific objection (795, 797) to the portions of the charge quoted above, and defendant Bonanno's requested instruction number 1 had addressed itself to the necessary conjunction of a fraudulent animus with the use of an assumed name. There was an understanding that each defense counsel had the benefit of the other's objections (750). Strikingly enough, while the Government's requests to charge (e.g., Government's Requests 12, 13, and 15, and Supplemental Requests unnumbered [presumably 32] and 33) went very far indeed in general language to equate fraud with nondisclosure or any situation in which a party to the transaction is or may be under a misapprehension susceptible to being corrected by the person alleged to have committed the fraud, those requested instructions did not in terms of the concrete issues of the case to be resolved by the jury, go nearly as far as the Court's actual instructions. The instructions effectively eliminated the defense of real or honestly-believed authority. It took from the jury the consideration of the critical mental issue of good-faith belief in authority to use the card on the part of Bonanno and derivatively on the part of Notaro.

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* Such a practice is of course unknown in our jurisdiction but is sometimes said to occur in other parts of the country.

The Court of Appeals found this charge substantially correct (Appendix to this petition, pp. 8a-9a). In critical part, of course, the Court's decision about the non-disclosure turns upon its conclusion that the jury may have (or if one is to be logically rigorous, must have) convicted the defendants on this part of the Government's theory of the case, but the Government, commencing with the indictment and running through the case to its summation (746), had argued that the mail fraud was based on the fact that Torrillo had been the victim of intimidation and fear when he gave his card to Perrone. The jury was presented with alternative ways of convicting the defendants, and the last alternative, set forth in the instructions just quoted, made the defendants' conduct effectively *malum prohibitum*.

REASONS FOR GRANTING THE WRIT

A. Where a United States Attorney has actual knowledge of material which is reasonably plainly helpful to the defense in preparation or trial, his failure to make disclosure to the defense should require a reversal, even in the absence of a wrongful motive to suppress such evidence or injure the defendant's rights. It is in the interests of the fair and even-handed administration of justice in the United States Courts for this Court to enunciate a clear rule for the guidance of prosecutors.

The Court of Appeals, as we have noted, made much of the fact that the prosecutor's non-disclosure was "negligent", but negligent in the matrix of the present case does not mean that the prosecutor was lacking in diligence in developing the evidence which was useful or potentially useful to the defense; it means merely that the prosecutor was not engaged in a willful act of misconduct in failing to disclose it. We wish our position to be clearly understood. We have never

charged and we do not charge now that the Assistant United States Attorney who conducted the trial set out with an evil purpose to conceal exculpatory evidence. We think however, it is a most unreasonable exaltation of the view which holds criminal trials to be a sporting contest between counsel to say that willful misconduct is the measure of the Government's duty. See: *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 Yale L.J. 136, 145-47 (1964); *Brady* v. *Maryland*, 373 U.S. 83 (1963); *United States* v. *Polisi*, 416 F. 2d 573, 577 (1969). We respectfully submit that it is the impact of the conduct on the rights of the defendant which forms the correct basis for assessing its consequences. Indeed, happily, in so far as the Federal Courts are concerned, willful suppression is an unusual aberration. There is, however, a much graver and more common tendency, arising frequently from an access of prosecutorial zeal, for the Government to play it "too close to the vest", *United States* v. *McFarland*, 371 F. 2d 701, 705 (2d Cir. 1967). Such conduct, in the words of the Court of Appeals in this case, serves the Government's "narrow interest of securing a conviction at the peril of a diligent search for truth" (Appendix to this petition, p. 5a). Where, as in this case, the discovery of the Government's concealment is promptly made and the countervailing interest in the finality of criminal judgments which the Government may find difficult or impossible to retry has not come into play, there is no sound argument against holding the Government to a high standard. See the Opinion of Chief Justice Burger, then Circuit Judge Burger, in *Brodie* v. *United States*, 295 F. 2d 157, 159 (D.C. Cir. 1961). The logic of the Court of Appeals, we submit, does not bear scrutiny. While it may be true that if the jury proceeded on the

theory that it was convicting for the mere use of Torrillo's name Torrillo's credibility would not come into critical consideration vis-a-vis the acceptance of the card by Diners' Club establishments, it is also plainly true that the Government put its primary cutting edge on the extortion of the card from Torrillo. A fair consideration of the defendant's contentions that they believed themselves authorized to use Torrillo's card necessarily would have been affected by a reasonably based argument that Torrillo, who was then under indictment by the very United States Attorney's office conducting the prosecution, was seeking to curry favor with the Government. Even beyond that, however, the question of any cheating amimus must well have turned, in part at least, on the jury's conclusion as to whether Torrillo had willingly lent his credit to the defendants or was the victim of a wrongful scheme on their part. We note in passing that the Court of Appeals, and we think correctly, gave no separate treatment to the perjury counts against Bonnano which were inextricably related to the mail fraud and arose from his testimony before the Grand Jury seeking to exculpate himself in connection with his use of the card. The rules which this Court shapes to regulate the adversary conduct of prosecutors, and defense counsel as well, are not ends in themselves, but rather means to achieve a fair adjudication based on a diligent search for the truth in which the prosecutor has a very special role in terms of his power and resources. Left undisturbed the decision below will lend itself to a narrow and hypertechnical construction by prosecutors of their duty. A grant of certiorari and a full review of this case will, we submit, not only result in the overturning of the unjust conviction of these defendants and the granting of a new and fair trial to them, but will also

permit this Court to mark out clearly the now all too shadowy duty of prosecutors to disclose favorable evidence to the defense. The present decision leaves affirmative misconduct as the measure of that duty. We think that the Constitution requires more and that public confidence in the administration of justice deserves more.

B. The instruction under which the defendants were convicted and which was approved by the Court of Appeals permitted, indeed required, the jury to find the defendants guilty, even absent a dishonest or cheating intent, contrary to the well-established rule of this Court that the mental element of a crime must be determined by the jury.

We will not reiterate here what we said above in our Statement of the case about the charge which Judge Mansfield gave to the jury. It is undoubtedly true that in crimes involving a fraudulent animus or some other mental element, the prosecution has a difficult burden. That burden, however, cannot be taken from the prosecution's hands or the jury's consideration. We respectfully submit that to permit the decision of the Court of Appeals to stand not only abridges the principles set forth in *United States* v. *Kyle,* 257 F. 2d 559, 565 (2d. Cir. 1958), but sets at naught the effectiveness of this Court's decision in *Morrisette* v. *United States,* 342 U.S. 246, 274, 276 (1952). We recognize that even if the decision below is erroneous, it would be unseemly for us simply to ask this Court to correct a wrong statutory construction of a Court of Appeals. We think, however, that where that wrong construction involves so important a statute as the mail fraud statute and trenches upon the jury's constitutional function, it is deserving of this Court's consideration and determination.

CONCLUSION

FOR THE REASONS ABOVE A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE JUDGMENT AND OPINION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

Respectfully submitted,

ALBERT J. KRIEGER
401 Broadway
New York, N. Y. 10013
Attorney for Petitioner Bonanno

ROBERT KASANOF
52 Broadway
New York, N. Y. 10004
Attorney for Petitioner Notaro

September 1970

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 886, 887—September Term, 1969

(Argued July 8, 1970 Decided July 28, 1970)

Docket Nos. 34806, 34807

UNITED STATES OF AMERICA, *Appellee*

v.

SALVATORE BONANNO and PETER NOTARO, *Appellants*

Before: FRIENDLY, SMITH and HAYS, *Circuit Judges.*

Appeal from judgment of conviction and sentence on trial to the jury in the United States District Court for the Southern District of New York, Walter R. Mansfield, *Judge,* on charges of mail fraud and conspiracy, in violation of 18 U.S.C. §§ 1341, 1342 and 371, and of appellant Bonanno on charges of perjury, in violation of 18 U.S.C. § 1621. Affirmed.

ROBERT KASANOF, New York, N. Y. (Albert J. Krieger, New York, N. Y., of counsel), *for Appellants.*

JAY S. HOROWITZ, Asst. U. S. Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, John M. Burns, III, Walter M. Phillips, Jr., and Jack Kaplan, Asst. U. S. Attorneys, of counsel), *for Appellee.*

SMITH, *Circuit Judge:*

Appellants were convicted after a jury trial in the United States District Court for the Southern District of New York, Walter R. Mansfield, *Judge,* on one conspiracy count and fifty-two counts of mail fraud, in violation of 18 U.S.C. §§ 371, 1341, 1342. Appellant Bonanno was also convicted on two counts of perjury before a grand jury, in violation of 18 U.S.C. § 1621; appellant Notaro was acquitted on a single count charging the same offense. We affirm.

The facts center around the use by Bonanno and Notaro of the Diner's Club Credit Card of one Torrillo, their social acquaintance and business associate. They acquired the credit card through the efforts of the apparently violent-natured co-conspirator Perrone (deceased as of March 11, 1968), who visited Torrillo in January or February, 1968, and who allegedly intimidated Torrillo into surrendering his card and then departed with Notaro to give the card to Bonanno.

Bonanno and Notaro drove west for a sojourn in Tucson, Arizona, using the credit card and signing Torrillo's name for divers expenses along the way and for purchases once in Arizona. On one occasion Notaro represented himself to be Torrillo and used the credit card to convince a Tucson travel agent and an American Airlines employee to sell him on credit five airline tickets from Montreal to Tucson. In all, appellants charged fifty-eight bills totaling almost $2400; the bills were never paid.

The spending spree came to an end on March 11, 1968, when Bonanno, using Torrillo's credit card, attempted to make a moderate purchase at a Tucson department store and the sales clerk made a routine call to the Diner's Club Credit Approval Department in Los Angeles. The credit manager, desiring to question the card user, spoke briefly with Bonanno who claimed he was Torrillo and who affirmed that he still lived and worked at fictitious places invented by the credit manager. The manager thereupon directed the department store to destroy the card and return it to the Diner's Club.

The defense claimed that Torrillo or Perrone authorized the use of the credit card, that appellants intended to pay the bills, and that Notaro was unaware of any irregularities in the card's acquisition and use.

The perjury charges arose out of Bonanno's testimony before the grand jury that he stopped using Torrillo's credit card as soon as he heard of Perrone's death (Per-

rone died about seven hours after the card had been impounded), and that he had consulted several Tucson attorneys about the propriety of using Torrillo's credit card, each of whom advised him it was all right (at trial the mentioned attorneys controverted Bonanno's account).

Appellants' principal claim on appeal is that the trial judge should have granted their motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure due to newly discovered evidence which the prosecutor had failed to disclose to the defense. The new evidence was that at the time of trial, Torrillo, a major prosecution witness, was awaiting trial on an indictment in the same district on a securities fraud charge.

Five days after the verdict, counsel for Notaro informed the court that he had just learned of the indictment and that he would bring a motion for a new trial. The Assistant United States Attorney responded that he had first learned of the indictment against Torrillo a week before trial when he interviewed Torrillo. At that time Torrillo apparently told the prosecutor that on the day Torrillo was arraigned he met counsel for Bonanno at the courthouse and revealed to him the securities charge.

The government argues that whether or not Bonanno's counsel was actually informed of the indictment by Torrillo, the prosecutor was justified in believing that Torrillo had informed him. Any remaining fear by the prosecutor that defense counsel did not know of the indictment was apparently put to rest by the prosecutor's confidence in defense counsel's thoroughness in researching government witnesses (as demonstrated particularly by their cross-examination of Torrillo in this case) and by the fact that Torrillo's indictment was an easily accessible item of public record.

In addition to stressing the purported good faith of the prosecutor's belief that defense counsel were already aware of the indictment, the government contends that the prose-

cutor believed that in any event the indictment would have been inadmissible to impeach Torrillo's testimony since it did not charge a felony or a crime involving moral turpitude, and it was not at the time a conviction.[1] See *United States* v. *Acarino*, 408 F.2d 512, 515-16 (2d Cir.), *cert. denied*, 395 U.S. 961 (1969).

First of all, as the government now admits on appeal, the existence of the outstanding indictment in the same district against a government witness is admissible evidence to show possible motivation of the witness to testify favorably for the government. See *United States* v. *Lester*, 248 F.2d 329, 334 (2d Cir. 1957). Even if the indictment were inadmissible at trial, this would not diminish its obvious value to the defense in preparing for trial and in giving it a lead to investigate possible governmental promises to the witness. See *United States* v. *Polisi*, 416 F.2d 573, 577-78 (2d Cir. 1969). Moreover, failing to disclose evidence valuable to the defense, even on the good faith belief by the prosecutor that it would be inadmissible at trial, deprives the defense of the opportunity to argue its admissibility and the court of its function of deciding the question.[2] Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 Yale L.J. 136, 147-48 (1964).

Second, we agree with the trial judge that since Torrillo told the prosecutor that he had informed Bonanno's attor-

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[1] Subsequent to the trial, Torrillo changed his plea to guilty to conspiracy.

[2] "It would be unfair not to add that we have confidence in the good faith of the prosecution. Its opinion that evidence of the concealed knife was inadmissible was a reasonable opinion which the District Court sustained and no court has overruled until today. However, the case emphasized the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful." *Griffin* v. *United States*, 183 F.2d 990, 992-93 (D.C. Cir. 1950).

ney of the indictment, "the prosecutor understandably, though erroneously, assumed throughout the trial that counsel for Bonanno and Notaro already knew of it." *United States* v. *Bonanno,* No. 68 Cr. 969, Unreported Opinion at 12 (S.D.N.Y. Feb. 15, 1970). But while such an assumption is understandable, it is not justified under the circumstances of this case. By failing to disclose the existence of the indictment against Torrillo on its assumption that the defense already knew of it, the prosecution served its narrow interest of securing a conviction at the peril of the diligent search for truth. There was nothing to be lost if the prosecution disclosed to the defense a fact it already knew; but if the defense did not already know, then nondisclosure by the prosecution resulted in the danger that a line of inquiry was foreclosed to the defense. Since the prosecution's belief was only an assumption, this danger was not insubstantial.

Moreover, at trial the defense vigorously attacked Torrillo's credibility by trying to establish a motive for Torrillo to testify favorably to the government against appellants, by attempting to show Torrillo's fears of prosecution on state charges and by pointing to the fact that Torrillo was never indicted for his admitted lies before the grand jury. This persistent defense attempt to show that Torrillo had a motive to cooperate with the government, together with the prosecutor's professed confidence in the thorough preparation of defense counsel, should have "flagged" the prosecutor's attention to the need to disclose the existence of the indictment by his office against Torrillo, since it was unlikely that the defense would intentionally forego such a useful piece of evidence.[3] See

[3] The argument that the defense may have intentionally avoided mention of the indictment against Torrillo as a trial tactic to avoid rehabilitative evidence by the prosecution that Torrillo in June, 1968, told essentially the same story to New York City police, is without moment. While prior consistent statements may be generally admissible to rehabilitate testimony impeached by evidence

United States v. *Miller*, 411 F.2d 825, 831-32 (2d Cir. 1969); *United States* v. *Keogh*, 391 F.2d 138, 147 (2d Cir. 1968).

Nondisclosure by a government prosecutor of a known indictment by his office against an important government witness cannot be justified by assumptions that the defense already knows of the indictment or by self-serving judgments as to the admissibility of the indictment or its utility to the defense. See *United States* v. *Acarino*, 408 F.2d 512, 516 (2d Cir.), *cert. denied*, 395 U.S. 961 (1969); compare, *Leary* v. *United States*, 383 F.2d 851, 868 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969), with *United States* v. *Peterson*, 170 F. Supp. 251, 253 (D. Utah 1959). In the instant case, however, the nondisclosure was only negligent. Appellants concede that the nondisclosure was not an instance of deliberate suppression with purpose to obstruct the defense and that it was not a failure to disclose evidence whose high value to the defense could not have escaped the attention of the prosecution. See *Miller* v. *Pate*, 386 U.S. 1 (1967); *Napue* v. *Illinois*, 360 U.S. 264 (1959); *Alcorta* v. *Texas*, 355 U.S. 28 (1957). Nor is this an instance where the prosecution has suppressed favorable evidence after a request for it by the defense. See *Brady* v. *State of Maryland*, 373 U.S. 83 (1963). In such instances of active prosecutorial misconduct, a lesser showing of the materiality of the undisclosed evidence will suffice. See *United States* v. *Polisi*, 416 F.2d 573, 577 (2d Cir. 1969); *United States* v. *Miller*, 411 F.2d 825, 831-32 (2d Cir. 1969); *United States* v. *Keogh*, 391 F.2d 138, 146-47 (2d

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of a motive to testify, see, e.g., *United States* v. *Grunewald*, 233 F.2d 556, 566 (2d Cir. 1956), *rev'd on other grounds*, 353 U.S. 391 (1957), the indictment against Torrillo (in May, 1968) antedated Torrillo's June, 1968 statements to the New York City police, and thus the alleged motive to cooperate was already present. In any event, the defense's desire to avoid rehabilitative testimony is an attenuated and self-serving hypothesis of why the defense failed at trial to bring the indictment to light. A more probable explanation is that the defense was unaware of the indictment.

Cir. 1968); *Kyle* v. *United States*, 297 F.2d 507, 513-14 (2d Cir. 1961).

Since the nondisclosure here was negligent, appellants must show that the indictment against Torrillo was material to the verdicts against them.

> "Negligent or even intentional failure of the prosecutor to disclose an additional item of impeaching evidence would not invariably require that a verdict be set aside. . . . The test, however, is . . . whether . . . there was a significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." *United States* v. *Miller*, 411 F.2d 825, 832 (2d Cir. 1969).

The materiality of the undisclosed evidence should also be "measured by the effect of the suppression upon defendant's preparation for trial. . . ."[4] *United States* v. *Polisi*, 416 F.2d 573, 577 (2d Cir. 1969); Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 Yale L.J. 136, 145-47 (1964). We conclude that disclosure to the defense of the indictment against Torrillo would not have aided significantly in its preparation for trial, and that defense use of Torrillo's indictment to impeach his trial testimony would not have raised a doubt in the minds of the jury as to appellants' guilt.

Torrillo's trial testimony dealt only with the manner that appellants acquired the credit card, allegedly through Perrone's intimidation of Torrillo. The central issue raised by the defense was whether appellants used the card in good faith. As the trial judge charged, the jury was entitled to convict appellants even if Torrillo had authorized

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[4] We stated this somewhat more generally:

> "The evidence must also be shown to be material and of some substantial use to the defendant." *United States* v. *Tomaiolo*, 378 F.2d 26, 28 (2d Cir. 1967).

the use of the card and even if appellants intended to pay the charges, so long as the jury found that appellants intended to mislead the various merchants by impersonating Torrillo in order to induce sales on credit which they believed would otherwise not have been forthcoming. See p. 4026, *infra*. The evidence of this latter intent to mislead merchants is overwhelming.[5] Whether or not the card was extorted from Torrillo bore only indirectly on the factual question of whether appellants intended to mislead merchants by impersonating Torrillo and signing his name. Moreover, even if Torrillo's testimony were discredited by evidence of a motive to cooperate with the prosecutor, this would only weaken the evidence of extortion of the card and would not bolster the defense's theory that the card's use was authorized.[6]

Appellants' other contentions require little discussion. Appellants claim that the judge's charge to the jury on

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[5] Some of the evidence is as follows: (1) Bonanno's abortive impersonation of Torrillo when talking on the phone with the Diner's Club Credit Department; (2) Bonanno's prior warning from a Tucson attorney that there was a forgery problem and that he should be careful; (3) Bonanno's offer to the same attorney to give him a suit if he could tell Bonanno where he could buy clothes with Torrillo's credit card; (4) and both appellants' use of other credit cards without permission and without payment; (5) Notaro's impersonation of Torrillo to purchase airline tickets on credit after a previous attempt had failed.

[6] Similarly, a defense question put to Torrillo about Torrillo's equity in Bonanno's house, bore only indirectly on whether Torrillo authorized the use of his credit card; to the extent Torrillo was secured against Bonanno's debts he would be less fearful of Bonanno's use of the card. And the alleged authorization by Torrillo itself was only one factor in whether appellants intended to defraud the merchants and the Diner's Club. In view of the marginal relevance of the question, the trial judge, in his discretion, was entitled to sustain the prosecution's objection in the absence of any evidentiary foundation for the inference that a possible indebtedness by Bonanno to Torrillo implied that Torrillo authorized the use of his credit card.

fraudulent intent deprived them of their defense of good faith use. The judge charged:

> "... if you find beyond a reasonable doubt that they [appellants] schemed to misrepresent themselves as Torrillo in order to deceive the Diner's Club and establishments into furnishing goods and services that would not have been furnished if they had disclosed their true identities, ... you may find that there was a scheme to defraud regardless whether the card was borrowed or extorted, regardless whether Perrone gave the defendants authority to use the card, and regardless whether they intended ultimately to pay for the goods and services.
>
> If on the other hand, you find that the defendants believed that their representations of their identity was immaterial, or that they had the right to use the card, you would find that there was no scheme to defraud."

The charge was substantially correct and we perceive no reason to require proof of intent to defraud the named credit card holder, Torrillo, when there was sufficient proof of intent to defraud sales establishments and the credit company by impersonating the signing the name of Torrillo. See generally, *United States* v. *Andreadis*, 366 F.2d 423, 431 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967); *United States* v. *Baren*, 305 F.2d 527, 528 (1962).

Appellants' contention in regard to the prosecutor's mention of the manner of Perrone's sudden death on March 11, 1968, is without merit.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of July, one thousand nine hundred and seventy.

Present: Hon Henry J. Friendly, Hon. J. Joseph Smith, Hon. Paul R. Hays, *Circuit Judges.*

United States of America, *Plaintiff-Appellee,*

v.

Salvatore V. Bonanno, a/k/a Bill Bonanno, a/k/a Don A. Torrillo, and Peter Norato, *Defendants-Appellants.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. Daniel Fusaro
Clerk

A true copy,

A. Daniel Fusaro,

[seal] *Clerk.*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

68 Cr. 969

UNITED STATES OF AMERICA

against

SALVATORE BONANNO and PETER NOTARO, *Defendants.*

APPEARANCES:

ROBERT M. MORGENTHAU, ESQ., United States Attorney for the Southern District of New York, Attorney for United States of America, By WALTER M. PHILLIPS, JR., Assistant United States Attorney, United States Courthouse, New York, N. Y. 10007

ALBERT J. KRIEGER, ESQ., Attorney for Defendant Bonanno, 401 Broadway, New York, N. Y. 10013

LEONARD H. SANDLER, ESQ., Attorney for Defendant Notaro, 52 Broadway, New York, N. Y. 10004

MANSFIELD, D.J.

On November 14, 1969, after a five-day jury trial defendants were found guilty of conspiracy to violate 18 U.S.C. §§ 1341 and 1342, mail fraud (§ 1341) and use of a fictitious name or address in furtherance of a scheme to defraud (§ 1342). Bonanno was also found guilty of perjury based upon testimony given by him before a federal grand jury sitting in the Southern District of New York.

The essence of the conspiracy and mail fraud charges was that pursuant to a scheme to defraud defendants falsely represented themselves to be one Don A. Torrillo and by using a Diner's Club card issued to him induced commercial establishments, restaurants, stores and airlines on various occasions in the early part of 1968 to furnish property, meals and services which would not have been furnished if the establishments knew that the person presenting the card was not in fact Torrillo.

The proof was overwhelming that in the early part of 1968 defendant Bonanno obtained the Torrillo card and used it to obtain merchandise and services by falsely representing himself to be Torrillo and that on at least one occasion Notaro also did so. The Diner's Club card issued to Torrillo and the contract between him and the Diner's Club, both of which were received in evidence, required the signature of the authorized card holder, Torrillo, for any goods or services. There was extensive testimony by proprietors of various establishments to the effect that Bonanno or Notaro had defrauded them by falsely representing themselves to be Torrillo and by signing Torrillo's name in order to obtain the merchandise or services. A Tucson, Arizona, travel agent and an American Airlines ticket counter employee at the Tucson Airport testified to Notaro passing himself off as Torrillo and signing Torrillo's name in order to obtain airline tickets for five people from Montreal to Tucson.

The defendants' fraudulent spree ended in a Tucson clothing store on March 11, 1968, when the proprietor detained them while he telephoned the Los Angeles manager of the Diner's Club Credit Approval Department, who uncovered the fraud and instructed the proprietor to retain the card.

Defendants did not seriously dispute that they had used Torrillo's Diner's Club card and that in doing so they had falsely represented themselves as Torrillo for the purpose of obtaining goods and services. An issue was raised, however, as to the existence of an intent to defraud on their part, defendants contending that the circumstances indicated merely that they had borrowed the card with Torrillo's consent, intending ultimately to pay for the goods and services obtained through use of the card. Although Bonanno did not take the witness stand, Notaro did so and testified that he thought Bonanno had authority from Torrillo.

As proof of defendants' intent to defraud, the Government introduced extensive evidence, including various misstatements made by Bonanno when he sought to pass himself off as Torrillo upon being interrogated by the manager of the Diner's Club Credit Approval Department on March 11, 1968; testimony of a Tucson attorney, Sobel, that he told Bonanno to be careful about using the card because of the "forgery" problem; the extent and amount of the bills run up by defendants through use of the card (some 58 bills amounting to almost $2,400); the fact that Bonanno had previously used a Mobil Oil credit card issued to a friend, William Levine, without Levine's authority; Notaro had earlier used the name "Peter Joseph" in opening an account with the Southern Arizona National Bank, upon which he then drew a check which was returned for insufficient funds; the fact that Notaro had on an earlier occasion used a credit card issued to a person named "Miller" to obtain airline tickets; and other similar circumstances.

In addition to the foregoing, the Government also offered the testimony of Don A. Torrillo, the authorized holder of the Diner's Club credit card used by the defendants, who testified that he never authorized either of them to use the card, that in late January or early February, 1968, one Samuel "Hank" Perrone, a mutual friend of himself and defendants, who is named as a co-conspirator in the indictment, visited Torrillo's home and in a threatening manner demanded and obtained the card from him and joined Notaro in an automobile. Torrillo further testified that thereafter he took no action because of his fear of the defendants and Perrone, and described an earlier incident in which Perrone had struck and knocked down an old man. Torrillo conceded that shortly prior to Perrone's taking the card from him Torrillo had, as an accommodation to Perrone and Bonanno, gone with them to a travel agency and personally used his Diner's Club card to purchase for them two airline tickets after advising them that the agent would not accept their personal check. On that occasion,

however, Torrillo himself signed his signature as the authorized card holder.

On cross-examination defense counsel brought out that on March 11, 1968, Perrone died, and that on April 17, 1968, Torrillo, after having been unsuccessful in getting Perrone, prior to his death, to pay for the two airline tickets purchased in January, and after receiving numerous bills that had been run up on his Diner's Club card during February and March, wrote a letter to the Diner's Club stating that he had lost his card and had previously reported the theft to them by letters dated February 2, 1968, and March 7, 1968. On May 28, 1968, at the instance of a Diner's Club representative, Torrillo signed an affidavit to the effect that the card had been lost or stolen on or about February 1, 1968. Torrillo testified that the statements about having lost the card and previously reporting the loss were false, and that upon being called to testify before a federal grand jury in July, 1968, he falsely testified that he had sent letters to Diner's Club. However, on the same occasion he also testified before the grand jury that the card had been taken from him by Perrone. At no time did Torrillo testify or advise anyone that he had authorized Bonanno or Notaro to use his Diner's Club card. Torrillo's explanation for his false statements to the effect that the card had been lost was that he was afraid of reprisal at the hands of Perrone and, after Perrone's death, at the hands of the "structure" or organization. It appears that Perrone was shot dead on March 11, 1968.

Defendants' counsel were afforded wide latitude in their cross-examination of Torrillo and took advantage of the opportunity to cross-examine him thoroughly in an effort to discredit him generally as a witness and specifically with respect to his testimony that he had never authorized Perrone or either of the defendants to use his Diner's Club card. For instance, in addition to bringing out the fact that Torrillo had falsely stated under oath to the Diner's Club and the grand jury that he had lost his card on or

about February 1, 1968, and had reported the loss earlier to the Diner's Club, cross-examination revealed that he had not been indicted for perjury because of his false testimony (later corrected) before the federal grand jury in the Southern District of New York, that he had grossly overstated his income in applying to the Diner's Club for the card, and that he had falsely described himself as an electrical engineer and as a person having various degrees, including a Ph.D., B.S. and M.S.E.E. (Master of Science and Electrical Engineering). It was also brought out that he had prior real estate business dealings with Bonanno and Perrone and apparently had sufficient collateral in property acquired by Perrone in an earlier real estate deal to cover the charges run up by Bonanno and Notaro on his card.

For purposes of cross-examination defendants' counsel had available to them transcripts of Torrillo's 1968 grand jury testimony and, by subpoena, informal interrogations by New York City police which took place in Torrillo's office on June 25, 1968, and July 9, 1968, prior to any interrogation before the federal grand jury. Tape recordings of the police interrogations had been made without Torrillo's knowledge, and the trial judge, after examining the transcripts, made available to defense counsel those portions of the tapes and transcripts relating in any way to the subject matter of this case or Torrillo's direct testimony. After defense counsel had reviewed the transcripts of the New York City police interrogation of Torrillo, he was recalled to the stand for further extensive cross-examination in which counsel for each defendant confronted him with statements made to the New York City police. However, although there were some minor inconsistencies between Torrillo's testimony at trial and the statements made to the New York City police in June and July, 1968, the essential facts stated to the police were consistent with the version later given at trial. The tapes revealed, for instance, that Torrillo told the police about his use of his

card to purchase the two airline tickets in January 1968 as a favor for Perrone and Bonanno. Although he initially hedged on the question of whether the credit card had been lost by him, he then revealed to the police that the card had been taken from him by Perrone on the latter's visit to his home and that he (Torrillo) falsely reported and swore to the Diner's Club that his card had been lost when in fact he knew that it had been taken from him by Perrone.

Neither Torrillo's statements to the police nor his federal grand jury testimony, both given within a few months after the events in question, support defendants' contention that he authorized Perrone or defendants to use his card. On the contrary, on June 25, 1968, he told the police that Perrone "came to my house and just to get rid of him I gave him the card," and on July 9, 1968, he told the police that "they [referring to Perrone and Bonanno] sort of bullied me into giving it [the Diner's Club card] to them in the first place" and "Perrone came over to my house to get the card . . . you know what I mean, so then at that point I'm saying to myself . . . how am I going to get out of here, you know, so then they took the card and I didn't hear from them. . . ." He further advised the police that he had been shocked when Perrone had "hit" and "socked" the older man who was in his late 50's or early 60's.

At the trial defendants' counsel urged that Torrillo's trial testimony was false and that the story given by him to the police had been motivated by the desire to help the police in prosecuting Bonanno. This argument was to some extent supported by the later dismissal of the New York City charges against Torrillo.

On November 19, 1969, five days after the jury's verdict finding both defendants guilty, Notaro's counsel, Leonard Sandler, advised this court that he had just learned that Torrillo, along with various others, had been charged as a defendant in an indictment filed on May 28, 1968 in the Southern District of New York, 68 Cr. 471, alleging viola-

tions of federal securities laws, to which he pleaded not guilty on June 4, 1968, which was pending in November 1969 when the present case was tried. On December 19, 1969 and December 23, 1969, defendants Notaro and Bonanno, respectively, moved for a new trial pursuant to Rule 33, F.R.Cr.P., on the ground that the pendency of the indictment constituted newly discovered evidence which the Government had failed to disclose to the defendants and which, if disclosed, would have enabled the defendants to impeach Torrillo before the jury by eliciting and contending he was motivated to favor the Government by the prospect of benefit in the disposition of the pending criminal charges against him. Defendants further contended that such impeachment of Torrillo might have led the jury to conclude that he voluntarily gave his Diner's Club card to Perrone, authorizing him to use it, rather than that it was extorted or taken by fraud, with the result that the jury might have acquitted the defendants. In addition defendants move for a new trial on other grounds discussed below.

There can be little question about the fact that a prosecutor owes an uncompromising duty, in the absence of explanatory circumstances, to disclose to defense counsel the existence of a pending criminal prosecution by his office against a witness called by him to testify for the Government. Such a disclosure gives defense counsel the opportunity, which may or may not be exercised as counsel see fit, to explore on cross-examination the nature of the pending criminal charge and the possibility that the witness may be motivated to testify favorably for the Government in the expectation that he will gain some consideration in the disposition of its pending case against him. Although the prosecutor's failure to comply with this duty may under some circumstances necessitate a new trial, see, e.g., *Peterson* v. *United States,* 170 F. Supp. 251 (D. Utah 1959), it does not automatically constitute a denial of due process or mandate such a disposition in every case. See *Leary* v. *United States,* 383 F.2d 851 (5th Cir. 1967), *reversed on*

other grounds, 395 U.S. 6 (1969). In determining whether a new trial should be ordered, we are called upon to consider the materiality of the pending criminal prosecution, the deliberateness of the prosecutor's conduct in failing to make it known to defense counsel, whether there was a lack of diligence on defendant's part, and whether, if the fact had been known and used by defendants at trial, there is a likelihood that it would have significantly affected the chances of acquittal. After carefully reviewing the record and considering the matter in light of these criteria, we do not believe that a new trial is warranted here.

We are not here dealing with a deliberate suppression of evidence potentially helpful to the defense, which would call for application of constitutional standards applied in cases involving denial of due process. See, e.g., *Brady* v. *Maryland,* 373 U.S. 83 (1963); *Miller* v. *Pate,* 386 U.S. 1 (1966); *Napue* v. *Illinois,* 360 U.S. 64 (1959); *Giles* v. *Maryland,* 386 U.S. 66 (1966). The evidence was never requested by defense counsel. Nor did the Assistant United States Attorney in charge of the case intentionally withhold from defense counsel the existence of the pending securities fraud indictment against Torrillo, which was wholly unrelated to the charge against Bonanno and Notaro. In fact he did not learn of the charge against Torrillo until a week or so before trial of the present case when he met Torrillo for the first time as a prospective witness and in the course of an interview learned of the indictment. At that time Torrillo advised him that Albert Krieger was present in Room 318 (the criminal calendar part of this court) when Torrillo pleaded not guilty to the securities fraud indictment and Krieger discussed the matter with Torrillo. Since the charge against Torrillo was a matter of public record, the prosecutor understandably, though erroneously, assumed throughout the trial that counsel for Bonanno and Notaro already knew of it. For reasons hereinafter stated, their failure to use the pending indictment for impeachment upon cross-examination of Torrillo would appear as sound defense tactics, since the contention that he was testifying

favorably for the Government in the hope of gaining a benefit would be countered by showing that he had earlier given to the New York City Police the same version as he gave at trial, which would only serve to rehabilitate and strengthen the witness.

In the absence of any deliberate suppression or any request by defense counsel the most that can be said is that the prosecutor was negligent. Although the question is not entirely clear, the standard of materiality to be applied in determining whether a new trial should be granted, at least in this Circuit, appears to be whether the evidence "would probably have raised a reasonable doubt as to . . . guilt in the mind of a conscientious juror," *United States* v. *Keogh*, 391 F.2d 138 (2d Cir. 1968); *United States ex rel. Romeo* v. *McMann*, — F.2d — (2d Cir. Nov. 17, 1969), or whether there appears to be "a significant possibility that the undisclosed evidence might have led to an acquittal or hung jury," *United States* v. *Miller*, 411 F.2d 825, 831 (2d Cir. 1969). Other circuits have used different approaches to the issue. See, e.g., *Levin* v. *Katzenbach*, 363 F.2d 287 (D.C. Cir. 1966) (whether the failure to disclose "might have" influenced the verdict), *Luna* v. *Beto*, 391 F.2d 329 (1967), 395 F.2d 35 (5th Cir. *en banc* 1968), *cert. denied*, 394 U.S. 966 (1969).

After a careful review of the trial record, we fail to find any significant possibility that the pendency of the indictment against Torrillo, had it been known to the jury, might have raised a reasonable doubt as to the defendants' guilt. Their contention is based upon the assumption that the jury might have inferred that, although Torrillo had authorized the defendants to use his credit card, he testified to the contrary in the hope that he would thereby gain some benefit in the pending prosecution against him. There are fatal flaws in the argument. The most striking defect is that prior to his being called to testify before the federal grand jury, which was the first occasion of any communication on his part with the United States Attorney's office

with respect to the matter, Torrillo gave to the S— O'Neil and Groggins of the New York City Police Department a statement that was substantially in accord with his trial in the present case. The New York City Police were unaware of the pending federal indictment against Torrillo. Accordingly there was never any suggestion that Torrillo might receive consideration from federal authorities if he cooperated with them and in any event it would have been apparent to Torrillo that they were powerless to help him in the federal arena.

We next note that when Torrillo thereafter appeared before the grand jury he testified falsely that he had written letters to Diner's Club to the effect that his card had been lost or stolen. In so testifying he was, as he had earlier indicated to the New York City Police, concerned about the fact that he had given a false affidavit to the same effect to the Diner's Club representative. However, on the same occasion he told the grand jury what he had already admitted to the New York City Police, that the card had been taken from him by Perrone rather than lost or stolen. There is therefore no support for defendant's argument based upon the pending indictment against him. Torrillo at no time ever testified or indicated that he had authorized Perrone or the defendants to use the card and hold themselves out to be Torrillo. In the one earlier instance when he purchased airline tickets for Perrone and Bonanno, there was no fraud; Torrillo personally used and signed his own card to obtain the tickets for them.

Lastly, we note that the independent evidence of defendants' fraudulent use of Torrillo's credit card was overwhelming. Thus, even if it be assumed *arguendo* that the card had been lost rather than taken from him, their guilt in inducing establishments to furnish property, meals and services on the false representation that they were Torrillo was firmly established.

There is conflicting evidence on the question of whether at least one of the defense attorneys, Mr. Krieger, knew

of the pending indictment against Torrillo. Torrillo states under oath that he told Krieger about the indictment on the occasion of Torrillo's entering a plea of not guilty to it on June 4, 1968 in Room 318, and that Krieger was present. He is corroborated by the court records for that date which show that Krieger was present in Room 318 on two other cases. Mr. Krieger, replying under oath, while conceding that he met Torrillo outside of Room 318 on the same date, denies knowledge of the indictment. It becomes unnecessary to resolve this issue, since the present motion must be denied for the reasons stated.

Defendants further moved pursuant to Rule 33, F.R.Cr.P., for a new trial on the grounds that they were prejudiced by the fact that some jurors were aware of a connection between the defendant Salvatore Bonanno and one Joseph Bonanno, his father, a reputed underworld Mafia figure, and by the disclosure at trial that Perrone was apparently murdered. Each prospective juror was independently examined on the voir dire out of the presence of all other jurors, which resulted in the elimination of any jurors who indicated they would be affected by anything previously heard or read with respect to Joseph Bonanno. Nearly all jurors finally selected had never heard of Joseph Bonanno. The one or two who had heard of him clearly and unequivocally stated that they were able to judge the case solely on the evidence to be introduced and not be affected by anything they had previously heard about the Bonannos. As for the reference to the death of Perrone, since Torrillo's state of mind was actually put in issue by defendants and he testified that in the period after Perrone's death he did not reveal all of the circumstances regarding Perrone's taking of his card because of his fear of defendants, Perrone's violent death was not wholly irrelevant. However, in the exercise of our discretion we instructed the jury, when the fact was mentioned by one witness, not to consider the circumstances of his death in judging the case against the defendants. Under all of the circumstances we are convinced that the defendants received a full and

fair trial by a jury which rendered a verdict based solely on the evidence that was admitted for its consideration.

Defendants also have subpoenaed from the Police of New York City and Nassau County wiretaps of conversations participated in by defendant Bonanno and they have been permitted to listen at length to tape recordings of these conversations. Since the conversations proved not to be related to the subject matter of this case or furnish any information that might be construed as leads through which the present case was developed, no motion to suppress has been made.

For the foregoing reasons the defendants' various motions, including renewal of motions made at trial for judgment of acquittal on the ground that the evidence was insufficient to sustain the convictions, are denied.

It is so ordered.

WALTER R. MANSFIELD
U.S.D.J.

Dated: February 18, 1970.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 750

SALVATORE BONANNO AND PETER NOTARO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–9a) is not yet reported. The opinion of the district court (Pet. App. 11a–22a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1970. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to September 26, 1970. The petition was filed on September 24, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

410-017—70

QUESTIONS PRESENTED

1. Whether the trial judge properly denied petitioners' motion for a new trial based upon discovery of an indictment pending against one of the government's witnesses which the prosecutor had failed to disclose.

2. Whether the trial judge erred in his instruction concerning fraudulent intent.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted on one count of conspiracy and fifty-two counts of mail fraud, in violation of 18 U.S.C. 371, 1341 and 1342. In addition, petitioner Bonanno was convicted on two counts of perjury in violation of 18 U.S.C. 1621. On March 9, 1970, Bonanno was sentenced to concurrent terms of four years' imprisonment on each count and fined $10,000; Notaro was sentenced to concurrent terms of one year and fined $1,000. The court of appeals affirmed (Pet. App. 1a–9a).

Evidence adduced at trial showed that Samuel Perrone, a co-conspirator since deceased, demanded that one Torrillo give him his Diner's Club credit card in order to buy airline tickets. Out of fear of Perrone's reputed violent nature, Torrillo surrendered the card; Perrone then left with petitioner Notaro, who was waiting in a car outside (Tr. 117–118, 143, 220). Torrillo testified that he did not authorize Perrone or either petitioner to use the card (Tr. 119–120).

Shortly thereafter, petitioners Bonnano and Notaro drove from New York City to Tucson, Arizona. They used the card to make purchases en route and in Tucson. In charging items, either Bonanno or Notaro would represent himself as Torrillo. Altogether, petitioners charged fifty-eight bills totalling $2,469 (Tr. 2–6, 9–10, 49–67, 253–255, 271–272, 281–282, 579, 581, 602, 606–623).

At the conclusion of the trial, the judge instructed the jury that intent to defraud was an essential element of the crime of mail fraud. After defining the term "intent to defraud," the court explained (Tr. 764):

> An issue has been raised, however, as to whether the defendants intended to defraud anybody, or whether they devised a scheme to defraud substantially as alleged. Did they, in using Torrillo's card, and falsely representing themselves to be Torrillo, intend to deceive the establishments and Diners' Club into furnishing merchandise and services that would not have been furnished if their true identities were disclosed? Or did they believe that misrepresenting themselves to be Torrillo was immaterial, and that it was perfectly lawful and all right to use the card?

The court properly instructed that it was not essential to prove that the card had been extorted if it were shown that petitioners intended to deceive the various establishments. It then stated (Tr. 766):

> If, on the other hand, you find that the defendants believed that their misrepresentations of their identity was immaterial, or that they

had the right to use the card, you would find that there was no scheme to defraud.

Five days after the guilty verdict was returned, petitioners' counsel moved for a new trial on the ground that the government had failed to reveal that Torrillo was under indictment for federal securities fraud at the time of petitioner's trial. The trial judge denied the motion, finding that the trial record showed no "significant possibility that the pendency of the indictment against Torrillo, had it been known to the jury, might have raised a reasonable doubt as to the defendants' guilt" (Pet. App. 19a). The court of appeals affirmed; it found that the prosecuting attorney had not acted in bad faith, but should not have assumed that defense counsel knew of the indictment.[1] Even so, the court below concluded that the nondisclosure was not so significant as to require a new trial, since, regardless of how petitioners obtained the card, the evidence overwhelmingly established their fraudulent use of it (Pet. App. 7a–8a).

ARGUMENT

1. As pointed out by the court below (Pet. App. 7a), "[s]ince the nondisclosure here was negligent, [petitioners] must show that the indictment against Torrillo was material to the verdicts against them."

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[1] The basis for this assumption appears from the affidavits of Torrillo and the four United States Attorneys connected with either this case or Torrillo's, which were submitted to the district court on February 19, 1970. A copy of each affidavit has been filed with the Clerk of this Court.

See *United States* v. *Miller*, 411 F 2d 825, 832 (C.A. 2). No such showing has been made.

Petitioners contend that disclosure of the indictment might have led the jury to infer that Torrillo's cooperation was given to gain some benefit in the pending federal prosecution against him. However, as noted by the trial court (Pet. App. 15a, 19a–20a), Torrillo first communicated with the New York City police who then had no knowledge of the federal indictment; "there was never any suggestion that Torrillo might receive consideration from federal authorities if he cooperated" (Pet. App. 20a) with the local officers.

The cross-examination of Torrillo as to his motive for testifying was extensive. Torrillo revealed that he had lied to the Diner's Club when first applying for the card and, later, when reporting its loss (Tr. 120–121, 144–145, 154–156); that he had lied before the grand jury (Tr. 147–148, 203–207) and an Assistant United States Attorney (Tr. 203–206); and that he had lied to New York City Police Department detectives during an interview, recordings of which were later admitted at trial (Tr. 450, 467, 503). Moreover, Torrillo was questioned on his fear of prosecution for perjury before the grand jury if he did not testify for the government. The point was made to the jury that Torrillo was never indicted on this charge despite his admitted perjury (Tr. 207–209). Thus, petitioners had ample opportunity to discredit the government's witness. In these circumstances, non-

disclosure of the pending indictment against Torrillo was not so material as to require a new trial.

In any event, it was basically immaterial how petitioners obtained the card. The gist of the fraud charged was that petitioners misrepresented themselves as "Don A. Torrillo" or "Dominick Torrillo" when using the card for various purchases at establishments which would not have honored the card without their misrepresentation. Their acts constituted a fraud against these establishments and against the Diner's Club, but not against Torrillo. Whether or not Torrillo authorized the use of the card was of only limited relevance to the central issue of whether petitioners intended to mislead merchants with whom they were dealing by impersonating Torrillo. As the court below noted, evidence of this intent was overwhelming (Pet. App. 8a).

2. Petitioners also contend that the trial judge's instructions concerning fraudulent intent were self-contradictory and removed from the jury consideration of petitioners' good-faith belief that they had been authorized to use the credit card and intended to repay charges made with the card. This is not so. The portion of the instruction being challenged by petitioners (see italics at Pet. 11), when read in context, properly informed the jury that a scheme to defraud could be found if the evidence showed only that the defendants intended to deceive the Diner's Club and others "into furnishing goods and services that would not have been furnished if they had dis-

closed their true identities." The court was careful to add, however, that if the defendants believed their representations were immaterial or that they had the right to use the card, they should not be convicted. The charge thus properly placed the issues before the jury.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
RONALD G. SCHEERAGA,
Attorneys.

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